(1)

Supreme Court, U.S.
FILED

05-160 MAY 23 2005

OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

Jorge Alberto Luz,

Petitioner,

v.

Alberto R. Gonzalez,

U.S. Attorney General, et al.

Respondent(s).

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Jorge Alberto Luz petitions for review of the Judgment of the United States Court of Appeals for the Eleventh Circuit, affirming the final Order of the Board of Immigration Appeals (BIA), which affirmed without opinion the Immigration Judge's ("IJ's") denial of Luz's application for a waiver of deportation, under former INA Section 212(c) 8 U.S.C. Section 1182, and the IJ's denial of Luz's application for a waiver of inadmissibility pursuant to INA Section 212(h), 8 U.S.C. Section 1182(h). The permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("IIRIRA") apply to this petition for Writ of Certiorari, with Luz's removal proceedings commencing after April 1, 1997.

I. Whether Petitioner's rights under the Fifth Amendment's Equal Protection Clause were violated by the IJ's denial of a waiver of inadmissibility, pursuant to INA Section (h) because the statute provides potential relief to a non-permanent resident alien convicted of an aggravated felony, yet it specifically denies relief to a permanent resident alien with the same conviction.

II. Whether Petitioner's Fifth

Amendment Equal Protection rights were violated by the IJ's denial of a waiver of deportation under former INA Section 212(c) because the statute barred relief for aliens who were deportable based upon firearm convictions, while it allowed relief for aliens who were excludable, based upon the same convictions.

LIST OF PARTIES

1. Jorge Alberto Luz, Petitioner
2. Alberto R. Gonzalez, Attorney General of the United States.

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STATEMENT OF JURISDICTION

I. The nature of the proceeding is a petition for writ of certiorari from the decision of the United States Court of Appeals for the Eleventh Circuit, denying in part and dismissing in part, the petitioner's appeal from the affirmance of the Board of Immigration Appeals, of the decision of the Immigration Judge, finding Petitioner deportable from the United States of America.

II. The statutory basis of the court's jurisdiction is U.S. Sup. Ct. Rule 12 and 15, 28 U.S.C.A. The federal jurisdiction was invoked upon the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, 110 Stat. 3009 (1996)("IIRIRA") because Petitioner's removal proceedings commenced after April 1, 1997. Because Luz is in removal proceedings having been convicted of an aggravated felony, the federal court only has jurisdiction to address if the jurisdictional stripping provisions of 8 U.S.C. Section 1252(a)(2)(C) apply and to address

substantial constitutional questions. Servin –Espinoza v. Ashcroft, 309 F.3d 1193, 1196 (9th Cir. 2002).

III. Judgment by the United States Court of Appeals was entered on November 24, 2004; The motion for re-hearing was denied on February 22, 2005; the Notice of Appeal was filed on December 30, 2003, in the United States Court of Appeals for the 11th Circuit. The oral decision of the Immigration Judge was rendered on August 16, 2002; the Board of Immigration Appeals affirmed the decision of the Immigration Judge on December 03, 2003.

IV. The United States Supreme Court has jurisdiction pursuant to U.S. Sup. Ct. Rule 17, 28 U.S.C.A. (1)(a) 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

The following Constitutional provisions, and statutes apply to this case:

I. The Fifth Amendment to the United States Constitution reads in pertinent part: "... No person shall be ... deprived of life. Liberty, or property, without due process of law..."
U.S.C.A. Const. Amend. V.

II. The Fourteenth Amendment to the United States Constitution reads in pertinent part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
U.S.C.A. Const.Amend. XIV.

III. INA Section 212(c), 8 U.S.C. Section 1182(c), repealed by Pub.L. No. 104-208, 3009-597(1996).

III. INA Section 212(h), 8 U.S.C. Section 1182(h).

IV. The permanent rules of the Illegal

V. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 2009(1996)('IIRIRA").

VI. the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No.104-132, 110 Stat. 1214 (1996).

STATEMENT OF THE CASE

Petitioner is a married male, native and citizen of Portugal. He petitions upon writ of certiorari from the judgment of the United States Court of Appeals for the 11th Circuit, denying in part and dismissing in part, his appeal, from the final order of the Board of the Immigration Appeals, affirming without opinion, the decision of the Immigration Judge, denying his applications for INA Section 212(c) and INA Section 212(h) waivers of deportation and inadmissibility to the United States. On March 23, 2000, the INS charged Luz as deportable, who was admitted to the United States in 1978, alleging that in 1994 he was convicted of attempted manslaughter with a firearm, and in 2000 of causing a firearms dealer to make a false entry. The Immigration Judge sustained the government's charges that Luz was removable due to convictions for attempting to purchase a firearm, and attempted manslaughter, an aggravated felony.

Luz sought a waiver from inadmissibility based upon INA Section 212(h) which the judge denied because he was a permanent resident convicted of an aggravated felony after his admission to the United States. Luz later sought a INA Section 212(c) waiver from deportation which the judge denied finding that Luz was convicted of a firearms violation for which there was no comparable grounds of exclusion. Luz thus alleges

that his Fifth Amendment Equal Protection rights were violated upon the denials of the waiver provisions.

STATEMENT OF SUBSTANTIAL ISSUES AND REQUEST FOR ORAL ARGUMENT

I. It is respectfully submitted that the case presents immigration issues affecting the rights of petitioner and other persons similarly situated that merit review by the court.

II. Petitioner's undersigned attorney respectfully requests oral argument to appear before the court and argue the issues.

PETITION FOR WRIT OF CERTIORARI

REASONS FOR GRANTING THE WRIT

The petition should be granted to settle irrationalities found in the subject immigration laws, and in the courts interpretations of these laws, which have resulted in the arbitrary and unreasonable treatment of legal permanent residents. The court should declare these laws as unconstitutional, and ascertain that the treatment of legal permanent residents and arriving immigrants will be lawful under equal protection standards in the future. The language of 8 U.S.C. Section 1182(h) has resulted in the denial of relief to Petitioner and in inconsistent treatment by the courts. See Song v. I.N.S., 82 F. Supp. 2d 1121 (C.D. Cal. 2000), as opposed to Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001). The statutory denial of INA Section 212(c) waiver relief to Petitioner, barred the court from considering the crime at issue, and balancing of the equities, to decide whether to grant relief to Petitioner.

On March 23, 2000 the Immigration and Naturalization Service (INS) alleged that Luz was subject to removal from the United States since in 1994 he was convicted of "attempted manslaughter with a firearm" in violation of Florida Statutes, Section 782.07, and in 2000 he was convicted of "causing a firearms dealer to make a false entry" in violation of 18 U.S.C. Section 922(m).

Luz admitted to his convictions for "attempted manslaughter with a firearm" and "causing a firearms dealer to make a false entry." Luz admitted that he was sentenced to a suspended sentence of five years incarceration for the attempted manslaughter conviction. The Immigration Judge ("IJ") found that the INS sustained its charges of removability under INA Section 237 (a)(2)(A))iii), for his attempt to purchase a firearm, and under INA Section 237(a)(2)(A)(iii), for his attempted manslaughter conviction, an aggravated felony as defined in INA Section 101(a)(43)(F). Petitioner sought a waiver of inadmissibility under INA Section 212(h), 8 U.S.C. Section 1182(h), which the IJ denied, finding that he was ineligible for a Section 212(h) waiver, as a permanent resident who had been convicted of an aggravated felony after his admission to the United States. Luz appealed to the BIA claiming that based upon the recent decision of INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347(2001), he was eligible to apply for a waiver of deportation under former INA Section 212(c), 8 U.S.C. Section 1182(c), since he had entered his plea of *nolo contendere* to attempted manslaughter with a firearm prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, 110 Stat. 1214 (1996), when the relief was available. The BIA granted the motion to remand to allow him the opportunity to petition for Section 212 (c) relief. On remand, on petition for a

Section 212 (c) waiver of deportation, the IJ found that Section 212 (c) waiver provisions could not be applied to overcome Luz's removability under Section 237(a)(2)(C) because there was not a comparable ground of inadmissibility to which the waiver could apply. Further, the IJ stated that even if there had been a comparable ground of inadmissibility, the judge would have denied Petitioner's Section 212(c) waiver application, as a matter of discretion.

The IJ thus denied Luz's Section 212(c) waiver application and ordered him removed from the United States. On appeal, the BIA affirmed the IJ's decision without opinion, based upon 8 C.F.R. Section 1003.1(e)(4).

COMES NOW, Petitioner, and as and for the first of three issues raised upon Petition for Writ of Certiorari, and alleges:

I. Luz's rights under the Fifth Amendment's Equal Protection Clause were violated by the IJ's denial of a waiver of inadmissibility pursuant to INA Section 212(h), because the statute provides potential relief to a non-permanent resident alien convicted of an aggravated felony, yet it denies relief to a permanent resident with the same conviction.

Although Petitioner is removable as an aggravated felon, INA Section 212(h), 8 U.S.C. Section 1182(h) is unconstitutional as applied to him because it violates the equal protection clause of the Due Process Clause of the Fifth Amendment to the United States Constitution. INA Section 212(h) provides that the Attorney General has the discretion to waive certain grounds of inadmissibility and therefore grant relief from deportation:

> In the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter, of such alien...

8 U.S.C. Section 1182(h)(1)(B).

Petitioner should be eligible for the Section 212(h) discretionary waiver because his removal from the country will impose an extreme hardship upon his two daughters, both U.S. citizens, and upon his wife, a legal

permanent resident. However the language of INA Section 212(h) prevents consideration of discretionary relief from deportation for Petitioner, a legal permanent resident who committed an aggravated felony after his date of admission to the United States. Section 212(h) provides in pertinent part:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ... since the date of such admission the alien has been convicted of an aggravated felony.

8 U.S.C. Section 1182(h).

Thus, the tenor of this law is humanitarian in that it seeks to promote family unity if possible, by way of discretionary relief for immigrants desiring to join their immediate relatives residing in the United States. The legislation then abruptly denies the equal amount of welfare to legal permanent residents. This provision of discretionary relief provided by the legislators for arriving aliens, and then the denial of the same benefit or opportunity for legal permanent residents results in the unequal treatment of persons under the law, and therefore,

the equal protection violation. Clearly legal permanent residents and arriving immigrants are similarly situated in their hopes for a new and better life in the United States.

Classifications that distinguish among groups of aliens are subject to rational basis review, and will be upheld from equal protection challenge if not arbitrary or unreasonable. See, Brooks v. Ashcroft, 283 F. 3d 1268 (11th Cir. 2002).

In Song v. I.N.S., 82 F.Supp2d 1121, 1131 (C.D.Cal. 2000), the disparities of Section 212(h) were challenged as irrational between individuals and violative of equal protection. The government argued that "Congress decided to allow illegal immigrants one chance to prove to the Attorney General that they should be admitted ... and legal immigrants have had their chance and abused it." The government further noted that "a lawful resident enjoys greater rights than a non-resident alien, and assumes commensurate responsibilities and duties," citing Castillo-Felix v. I.N.S., 601 F.2d 459, 470(9th Cir. 1979), and that it is implied that one of these duties is to follow the law. Song, id. 1133.

The court held that this law violated the Equal Protection Clause. The court reasoned that there are very logical reasons for treating lawful permanent residents *better* than illegal immigrants,

and further reasoned that in the case of Section 212(h) Congress has intentionally created a distinction which treats lawful permanent residents *worse* than illegal immigrants. The court further reasoned that it is irrational to punish aliens more heavily simply because they have closer ties to the United States. Song, id. At 1133. In conclusion, the denial of Section 212(h) relief for legal permanent residents is not rational and violates the equal protection clause of the Constitution. Id. At 1134.

Thus, the court found that this law was not rationally related to a legitimate government purpose, and therefore it violated the rights of legal permanent residents to equal protection under the law. See, also Jankowski v. I.N.S., 138 F.Supp. 2d 269 (D.Conn. 2001) holding that this law violated the equal protection clause; the distinction was not rationally related to the legitimate government purpose of expediting the removal of criminal aliens from the United States or even of removing as quickly as possible certain classes of criminal aliens, i.e. those convicted of aggravated felonies. Id. At 278.

The United States Court of Appeals for the Eleventh Circuit denied petitioner's claims. On jurisdictional issues, it held that "because [Luz] has been determined to be removable as an aggravated felon ... this court only has jurisdiction

to address whether the jurisdiction-stripping provisions of 8 U.S.C. Section 1252(a)(2)(C) apply and to address substantive constitutional questions..." citing, Oguejiofor v. Att'y Gen., 277 F.3d 1305, 1308 (11th Cir. 2002). The court reasoned that since Luz is an alien who is removable based upon having committed an aggravated felony, a disqualifying offense, therefore Section 1252(a)(2)(C) applies. The court further reasoned that it could address Luz's equal protection argument to determine if it amounts to a "substantial constitutional question." See, Oguejiofor, id. At 1309-10.

The Eleventh Circuit court held that Congress's decision to make lawful permanent resident aliens who have been convicted of an aggravated felony ineligible for relief under INA Section 212(h) and not deny the relief to others, does not violate equal protection. The court reasoned from its precedent of Moore v. Ashcroft, 251 F.3d 919, 926 (11th Cir. 2001); accord, Oguejiofor, 277 F.3d at 1310. Further, this argument did not amount to a substantial constitutional claim, according to the court, citing Moore, 251 F. 3d at 926 n. 10.

The Eleventh Circuit court of appeals has stated that one of Congress' goals in enacting reforms to the INA was to expedite the removal of criminal aliens from the United States, and that the elimination of INA Section 212(h) relief for lawful

permanent residents who commit aggravated felonies, eradicated one source of delay. Moore, id. At 925. The court thus concluded that it lacked jurisdiction to hear this issue, and dimissed this part of Luz's petition for review.

That one of Congress' goals in enacting reforms to the INA was to expedite the removal of criminal aliens from the United States, does not explain a rational basis for the unequal treatment of permanent residents under INA Section 212(h). Allowing discretionary relief from inadmissibility to legal permanent residents would allow for a better form of due process in removal proceedings that may affect them.

WHEREFORE, based upon the above and foregoing grounds, petitioner prays that the court grant the petition for certiorari due to the violation of his Fifth Amendment equal protection rights upon being denied relief under INA Section 212(h).

COMES NOW, Petitioner, and as and for his second grounds raised upon Petition for Writ of Certiorari, alleges:

II. Luz's Fifth Amendment equal protection rights were violated by the IJ's denial of a waiver of deportation under former INA Section 212(c) because the statute barred relief for

aliens who were deportable due to firearms convictions, while it allowed relief for aliens who were excludable under the same type of convictions.

In the case at bar the United States Court of Appeals for the Eleventh Circuit held that "classifications that distinguish among groups of aliens are subject to rational basis review, and will be found valid if not arbitraty or unreasonable." Citing, Chuang v. U.S. Att'y Gen., No. 03-15024, man. Op. at 9 (11th Cir. Sept. 2, 2004)(quoting Brooks v. Ashcroft, 283 F.3d 1268, 1274 (11th Cir. 2002)).

The court of appeals, citing to Chuang, id. at 6-7, noted that "former INA Section 212(c), 8 U.S.C. Section 1182(c), provided that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States as the discretion of the Attorney General without regard to certain specified grounds of exclusion enumerated in INA Section 212(a), 8 U.S.C. Section 1182(a)."

The court further noted that "In 1996,

AEDPA Section 440(d) rendered aliens convicted of aggravated felonies, regardless of the length of their sentence, ineligible for discretionary relief from deportation under Section 212(c) of the INA." Id. at 7; and that the BIA has interpreted AEDPA Section 440(d) as rendering only deportable aliens, not excludable aliens, ineligible for relief." Citing to Chuang, id. at 8.

The court below addressed the argument that "AEDPA Section 440(d)'s bar against INA Section 212 (c) relief for deportable criminal aliens, and its allowance of Section 212(c) relief for excludable aliens, violate[d] petitioner's rights to equal Protection under the Due Process Clause of the Fifth Amendment." Citing to Chuang, id. at 8-9. There, the court had approved the Seventh Circuit's reasons for rejecting the claim:

> A rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distint from deportable aliens: it creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntarily departure,

> a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings.

Chuang, id. at 10 (quoting LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998)). Based upon this line of precedent the court concluded that there is a rational basis behind the different treatment of excludable and deportable aliens, and thus rejected Luz's equal protection challenge to former Section 212(c) and denied that part of his petition for review.

However, in Servin – Espinoza v. Ashcroft, 309 F.3d 1193 (9th Cir. 2002), a lawful permanent resident was ordered deported to Mexico after conviction of an aggravated felony. The District Court granted Servin – Espinoza's petition for writ of habeas corpus, on the ground that enforcing Section 44(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.104-132, 110 Stat. 1214 (1996), which bars discretionary relief under former Section 212(c) of the Immigration and Nationality Act (INA) against deportable aliens, but not against excludable aliens, violated the equal protection component of the Due Process Clause. The appellate court affirmed, reasoning that it could review constitutional questions *de novo*, id. at 1196, and reasoned that the INS had intentionally and

systematically treated aliens in exclusion proceedings more favorably by allowing them Section 212(c) relief and not allowing it for those in deportation proceedings. Id.

There, the government offered three reasons to justify that there was a rational basis for the difference in treatment: 1. denying relief to deportables but not to excludables encourages criminal aliens already in the United States to leave voluntarily; 2. criminal aliens at large in the United States pose a greater threat than those abroad seeking to return; and 3. at the time of AEDPA's enactment, the number of criminal aliens in deportation proceedings was ten times the number in exclusion proceedings. Servin – Espinoza, 309 F.3d 1193, id. at 1196.

In that case, the 9th Circuit Court of appeals reasoned that in drafting the AEDPA Section 440(d) "Congress treated excludable and deportable aliens equally, not differently, with respect to the availability of relief under Section 212(c), that is, that Congress did not intend for either category of aliens to have this relief." The court cited to its previous interpretation of the statute, found in its precedent of United States v. Estrada-Torres, 179 F.3d 776 (9th Cir. 1999), and determined that "the reasons advanced by the government for the difference in treatment could not have been Congress's reasons, for the simple fact that Congress did not intend that difference."

Id. at 1197. The court thus held that the application of AEDPA Section 440(d) which barred Section 212(c)relief to deportable aliens, but not to excludable aliens, violated the equal protection rights of petitioner. Id. at 1199.

The court in Luz's case decided that INA Section 212(c) waiver is not available in deportations on grounds for which there are no analoguous grounds of exclusion. See for example, Rodriguez-Padron v. I.N.S., 13 F.3d 1455(11th Cir. 1994). However, courts have held that 212(c) waiver is available in deportations based upon unlawful entry without inspection, a ground for which there is no analogous basis for exclusion. See, Bedoya-Valencia v. I.N.S. 6 F.3d 891 (2d Cir. 1993).

The petitioner submits that it is "irrational to deny [him] the opportunity to seek 212(c) waiver when those convicted of more serious crimes may apply for discretionary waiver...this creates a classification of aliens based solely on their crimes [that] does not permit for consideration of the severity of the crimes or equities of the aliens as a means of affording relief." 13 F.3d 1455, 1458 id.

WHEREFORE, based upon the above and foregoing grounds, petitioner prays that the court grant the petition for writ of certiorari, based upon violation of his Fifth Amendment equal protection rights due to denial of relief under INA Section 212(c).

Respectfully Submitted,

BY: _____
Juan Carlos Perez Esq.
Attorney for Petitioner

Jorge a. Luz v. Attorney General

EXHIBITS

I. Appellate Court's Order denying motion for re-hearing

II. Appellate Court's Judgment Denying relief

III. Appellate Court's Opinion Denying in part and and Dismissing in part

IV. Decision of Board of Immigration Appeals Denying relief

V. Decision of Immigration Judge Denying relief

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-16567 – HH

JORGE ALBERTO LUZ,
PETITIONER,
(SEAL: filed U.S. court of Appeals Eleventh Circuit, Feb. 22 2005 Thomas Kahn clerk)

V.

U.S. ATTORNEY GENERAL,
RESPONDENT.

Petition for Review of an Order of the Board of Immigration Appeals

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Before: TJOFLAT, ANDERSON, and DUBINA, Circuit Judges.

Per curiam:

The petition for rehearing filed by Jorge Alberto Luz is
DENIED
ENTERED FOR THE COURT:

/S/ Joel F. Dubina

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(seal: filed U.S. COURT OF APPEALS
ELEVENTH CIRCUIT Nov. 24, 2004 THOMAS
K. KAHN CLERK)

NO. 03-16567

District Court Docket No. A36-368-096-

JORGE ALBERTO LUZ,
PETITIONER,

V.

U.S. ATTORNEY GENERAL,
RESPONDENT.

Petition for Review of an Order of the Board of Immigration Appeals

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JUDGMENT

It is hereby ordered, and decreed that the attached opinion included herein by reference is entered as the judgment of this Court.

Entered: November 24, 2004
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

(SEAL: ISSUED AS MANDATE
MARCH 02 2005
U.S. COURT OF APPEALS
ATLANTA, GA.)

Decision of the United States Court of Appeals for the Eleventh Circuit, with written opinion:

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-16567
Non-Argument Calendar

BIA No. A36-368-096

JORGE ALBERTO LUZ,

Petitioner,

V.

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

(November 24, 2004)

Before TJOFLAT, ANDERSON, and DUBINA, Circuit Judges.

PER CURIAM:

Through counsel, Jorge Alberto Luz petitions for review of the Board of Immigration Appeals' ("BIA") final order affirming without

opinion the immigration judge's (IJ's) denial of Luz's application for a waiver of deportation under former INA Section 212(c), 8 U.S.C. Section 1182(c), repealed by Pub. L. No. 104-208, 3009-597(1996, and the IJ's denial of Luz's application for a waiver of inadmissibility pursuant to INA Section 212(h), 8U.S.C. Section 1182(h). The permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996)("IIRIRA"), govern this petition for review because Luz's removal proceedings commenced after April 1, 1997.

On march 23, 2000, the Immigration and Naturalization Service (INS) issued a Notice to Appear to Luz, native and citizen of Portugal who was admitted to the United States in 1978 as a lawful permanent resident. The INS alleged that in 1994, Luz was convicted of "attempted manslaughter/firearm," in violation of Fla. Stat.Section 782.07, and, in 2000, he was convicted of "causing a firearms dealer to make a false entry" in violation of 18 U.S.C. Section 922(m). The INS charged, *inter alia*, that Luz was subject to removal pursuant to INA Section 237(a)(2)(C), 8 U.S.C. Section 1227(a)(2)(C), for having been convicted of attempting to purchase a firearm as defined in 18 U.S.C. Section 921(a), and INA Section 237(a)(2)(A)(iii), 8 U.S.C. Section 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony as defined in INA Section 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F).

At his initial removal proceeding, Luz, through counsel, admitted to allegations contained in the Notice to Appear, including his convictions for "attempted manslaughter/firearm" and "causing a firearms dealer to make a false entry." He admitted that he was sentenced to a suspended sentence of five years incarceration for the attempted manslaughter conviction. At a subsequent removal proceeding, the IJ determined that the INS sustained its charges of removability under INA Section 237(a)(2)(C), for Luz's conviction of attempting to purchase a firearm, and under INA Section 237(a)(2)(A)(iii), for his attempted manslaughter conviction, an aggravated felony as defined in INA Section 101(a)(43)(F). Luz sought a waiver of inadmissibility under INA Section 212(h), 8 U.S.C. Section 1182(h), which the IJ denied, finding that he was ineligible for a Section 212(h) waiver because he was a permanent resident who had been convicted of an aggravated felony after his admission into the United States. The IJ ordered Luz removed to Portugal.

Thereafter, Luz moved the BIA for a remand, arguing that under the recently decided *INS v. St.Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), he was eligible to apply for a waiver of deportation under former INA Section 212(c), 8 U.S.C. Section 1182(c), because he entered his plea of nolo contendere to attempted manslaughter with a firearm prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996("AEDPA"), Pub.L.No. 104-132, 110

Stat. 1214(1996), when such relief was available. The BIA granted Luz' motion to remand to allow Luz the opportunity to apply for Section 212(c) relief.

On remand, after two hearings on Luz's application for a Section 212(c) waiver of deportation, the IJ found that Luz's Section 212(c) waiver could not be used to overcome his charge of removability under Section 237(a)(2)(C) because there was not a comparable ground of inadmissibility to which the waiver could apply. The IJ further found that even if there had been a comparable ground of inadmissibility, the IJ would have denied Luz's Section 212(c) waiver application as a matter of discretion because of the seriousness of his conviction for attempted manslaughter, his "utter disregard" for the safety of his family during that incident, and his "attempt to get another weapon" after that incident. The IJ denied Luz's Section 212(c) waiver application and ordered Luz removed to Portugal. On appeal, the BIA affirmed the IJ's decision without opinion, pursuant to 8 C.F.R. Section 1003.1(e)(4).

Luz raises three issues on appeal, none of which have merit, which we discuss in turn.

First Luz argues that his Fifth Amendment equal protection rights were violated by the IJ's denial of a waiver of deportation under former INA Section 212(c) because the statute barred relief for aliens who were deportable based upon

firearm convictions while it allowed relief for aliens who were excludable based on identical convictions.

The essence of equal protection is that all persons similarly situated should be treated alike. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Draper v. Reynolds*, 369 F.3d 1270, 1278n.14 (11th Cir. 2004), petition for cert. Filed, No. 04-443 (Sept. 24, 2004). "Classifications that distinguish among groups of aliens are subject to rational basis review, and will be found valid if not arbitrary or unreasonable." *Chuang v. U.S. Att'y Gen.*, No. 03-15024, man. Op. at 9 (11th Cir. Sept. 2, 2004)(quoting *Brooks v. Ashcroft*, 283 F.3d 1268, 1274(11th Cir. 2002)).

> "Former INA Section 212(c) 8 U.S.C. Section 1182(c), provided that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States at the discretion of the Attorney General without regard to certain specified grounds of exclusion enumerated in INA Section 212(a), 8 U.S.C. Section 1182(a)."

Id. at 6-7. "In 1996, AEDPA Section 440 (d) rendered aliens convicted of aggravated felonies, regardless of the length of their sentence, ineligible for discretionary relief from deportation under Section 212(c) of the INA." *Id.* at 7 (internal quotations and citations omitted). "the BIA has interpreted AEDPA Section 440(d) as rendering only deportable aliens, not excludable aliens, ineligible for relief." *Id.* at 8. (citations omitted).

In *Chuang*, we addressed the petitioner's argument that "AEDPA Section 440(d)'s bar against INA Section 212(c) relief for deportable criminal aliens, and it's allowance of Section 212(c) relief for excludable aliens, violate[d] his right to Equal Protection under the Due Process Clause of the Fifth Amendment." *Id.* at 8-9. It quoted with approval the Seventh Circuit's reasoning for rejecting such an argument:

> A rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens; it creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to

> the country and by doing so trigger exclusion proceedings.

Id. at 10 (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)). We concluded that there is a rational basis behind the different treatment of excludable and deportable aliens, and we rejected the petitioner's equal protection claim. *Id.*

Accordingly, based on the foregoing decision, we reject Luz's equal protection challenge to former Section 212(c) and deny that portion of his petition for review.

Second, Luz argues that his rights under the Fifth Amendment's Equal Protection Clause were violated by the IJ's denial of a waiver of inadmissibility pursuant to INA Section 212(h) because the statute provides potential relief to a non-permanent resident alien convicted of an aggravated felony, yet it categorically denies relief to a permanent resident with an identical conviction. He asserts that Section 212(h) is arbitrary and unreasonable, and thus unconstitutional.

"Because [Luz] has been determined to be removable as an aggravated felon ... this court only has jurisdiction to address whether the jurisdiction-stripping provisions of 8 U.S.C. Section 1252(a)(2)(C) apply and to address substantial constitutional questions ..." *Oguejiofor v. att'y Gen.*, 277 F.3d 1305, 1308 (11th

Cir. 2002)(citation omitted). It is uncontested that Luz is an alien who is removable based upon having committed an aggravated felony, a disqualifying offense, and therefore, Section 1252(a)(2)(C) applies. Nevertheless, we may address Luz's equal protection argument to determine if it is a "substantial constitutional question." *See id.* at 1309-10.

We have directly addressed an argument identical to Luz's and found that Congress's decision to make lawful permanent resident aliens who have been convicted of an aggravated felony ineligible for relief under Section 212(h) relief and to not do so with other aliens does not violate equal protection. *Moore v. Ashcroft*, 251 F.3d 919, 926(11th Cir. 2001); accord *Oguejiofor*, 277 F. 3d at 1310. Moreover, we found that such an issue did not constitute a substantial constitutional claim. *Moore*, 251 F.3d at 926 n. 10.

Accordingly, we conclude that we lack jurisdiction to hear this issue, and we dismiss this portion of Luz's petition for review. *See id.* at 926.

Third, Luz argues that his Fifth Amendment due process rights were violated by the BIA's affirmance without opinion of the IJ's decision because the BIA did not affirmatively address statutory and constitutional issues that he raised on appeal.

In pertinent part, 8 C.F.R. Section 1003.1(e)(4)(i) states:

> The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

The summary affirmance procedures set forth in 8 C.F.R. Section 1003.1(e)(4)(i) ad (ii) are nearly identical in language to the summary affirmance procedures set forth in the former 8 C.F.R. Section 3.1(a)(7)(i) to (iii)[1]. In *Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283, 1288-89(11th Cir. 2003), we held that the BIA's summary affirmance procedures established by the Attorney General in Section 3.1(a)(7) do not violate an alien's due process rights, at least where there is no evidence that the BIA member who reviewed the alien's removal deviated from the requirements of

3.1(a)(7). 327 F.3d at 1288-89. Importantly we noted that "under the INS regulations, no entitlement to a full opinion by the BIA exists[,]" and "[t]hat a one-sentence order was entered is no evidence that the BIA member did not review the facts of [the alien's] case." *Id.* at 1289 (brackets, internal quotations, and citations omitted).

Accordingly, we conclude that Luz's due process rights were not violated simply because the BIA affirmed the IJ's decision without opinion. Moreover, that a one sentence order was entered is no evidence that the BIA member did not review the facts of Luz's case, including the statutory and constitutional issues that he raised on appeal, and there is no evidence that the BIA member who reviewed Luz's removal deviated from the requirements of the regulations in determining whether the appeal could be subject to the Attorney General's streamlining procedures.

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[1]Pursuant to the Homeland Security Act of 2002, 8 C.F.R. Section 3.1 was renumbered at 8 C.F.R. Section 1003.1, effective February 28, 2003. The substance of this regulation was not changed. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9824-25 (Feb. 28, 2003).

Therefore, we affirm the BIA's affirmance without opinion of the IJ's decision, even though the BIA did not explicitly address Luz's claims. For the foregoing reasons, we dismiss in part and deny in part Luz's petition for review.

PETITION DISMISSED IN PART AND DENIED IN PART.

Decision of the Board of Immigration Appeals
U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A36-368-096 – Brandenton Date:

In Re: LUZ, JORGE ALBERTO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lewis, Neil F., Esquire

ON BEHALF OF DHS: James K. Grim, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. Section 1003.1(e)(4).

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FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXCECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATION COURT
BRANDENTON, FLORIDA

File No. A36-368-096 August 16, 2002

In the Matter of

JORGE ALBERTO LUZ

IN REMOVAL
PROCEEDINGS

Respondent)

CHARGE: Section 237(a)(2)(C) of the Immigration and Nationality Act – relating to an alien who has been convicted of a law relating to a firearm or destructive device; section 237 (a)(2)(A)(ii) of the Immigration and Nationality Act relating to an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct; Section 237(a)(2)(E)(i) of the Immigration and Nationality Act relating to an alien who at any time has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment; Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act- relating to an alien who has been convicted of an aggravated felony.

APPLICATIONS: section 212(c) of the Immigration and Nationality Act – waiver.

ON BEHALF OF RESPONDENT:
Neil Lewis Esquire

ON BEHALF OF SERVICE:
Michael Babitz, Esquire
Assistant District Counsel
Brandenton District

ORAL DECISION OF THE IMIGRATION JUDGE

The respondent is a married male who is a native and citizen of Portugal. The matter came before the Immigration Court as a result of the Form I-862, Notice to Appear, which was marked and admitted as Exhibit 1 in the case. The Notice to Appear alleges that the respondent is removable pursuant to Section 237(a)(2)(C) of the Immigration and Nationality Act relating to an alien who has been convicted of a law relating to to a firearm or domestic device as defined in Section 921(a) of Title 18 United States Code. The respondent admitted the factual allegations with respect to that charge of removability, and that charge was sustained.

The second charge of removability is pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act relating to an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. At a prior hearing, that charge was not sustained, as the

former judge on this case determined that the last incident relating to the mis-reporting of information on the gun application was not a crime involving moral turpitude; therefore, that charge was not sustained.

The third charge of removability was pursuant to Section 237(a)(E)(i) of the Immigration and Nationality Act, relating to an alien who has been convicted of a crime of domestic violence, a crime of stalking or a crime of child abuse, child neglect, or child abandonment. The Immigration Service at a prior hearing withdrew that charge of removability. So, that charge was not sustained.

The court received as Exhibit 2 in this case a Form I-261, 11c, additional charge of removability. That is the respondent was charged under Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act relating to an alien who has been convicted of an aggravated felony. The respondent initially denied that charge. However, that charge was sustained. The Respondent was convicted of a crime involving violence, for which a sentence of five years incarceration was imposed, although the sentence was suspended and the respondent was placed on probation. The court. found that that charge of removability has been sustained.

Based on the evidence of record and the admissions of the respondent's counsel, the court

finds that removability has been established in accordance with the law.

The respondent has previously sought a 212(h) waiver in this case. That case was denied. The matter was on appeal to the Board of Immigration Appeals; and subsequently, the Supreme Court in its decision INS v. St.Cyr, 121 S. Ct. 2271(2001 was issued by the Supreme Court. Basically pursuant to that Supreme Court decision, it became apparent that the respondent was eligible to apply for relief under Section 212(c) of the Act, and the matter was remanded to this court for consideration of that application.

The court received additional documents in this case. There were birth certificates and other documents filed by the respondent on or about August 3rd of 2000, which was marked and admitted as Exhibit 3. The record of Deportable Alien in this matter was marked and admitted as Exhibit 4. The Judgment in the criminal case for causing a firearms dealer to make a false entry was marked and admitted as Exhibit 5. The information and the conviction records relating to the respondent's convictions for attempted murder in the first degree, two counts, and shooting within a building was marked and admitted as Exhibit 6. The court received as Exhibit 7 additional documents filed by the respondent on April 23, 2002, and also included the Form I-191, which was the application for 212(c) relief. The court received and additional filing from the respondent

on August 1, 2002, which was marked and admitted as Exhibit 8; and the court received an additional filing on august 9, 2002, which was marked and admitted as Exhibit 9. this was also a document filed by the respondent.

No other documentary evidence was submitted. However, the court heard the testimony of the respondent, the respondent's wife, and the respondent's daughter Marissa. The court also accepted the proffered testimony of another daughter who had written a letter to the court. The court and the Immigration Service accepted that proffer of the letter and considered the information contained in that letter as the information that this daughter would have provided if she had testified. The court would also note for the record that there were other of the respondents children who were present and available to testify and would have testified if their testimony would not have been duplicative, and if the time constraints had allowed. But the court did note the presence of other children who were ready, willing and able to testify on the respondent's behalf.

STATUTORY REQUIREMENTS FOR 212(C) RELIEF

Section 212(c) of the Act provides that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation and who was returning to a lawful, unrelinquished domicile of

seven consecutive years may be admitted to the United States in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in Section 212(c).

A section 212(c) waiver is available in deportation proceedings only to an alien who has been found deportable under a ground of deportability for which there is comparable ground of exclusion. See, Matter of Hernandez-Casias, Int. Dec. 3147(Attorney General 1991). The court believes that there is a problem in this case, because the respondent was found removable pursuant to Section 37(a)(2)(C) of the Act relating to a crime involving possessing a weapon, an accessory, or a destructive device, as defined in Section 921(a) Title 18 of the United States Code. There is not a comparable ground of excludability. The court is, therefore, finding that the 212(c) waiver application would not be effective in eliminating the weapons charge of deportability.

The respondent's statutory eligibility for relief under Section 212(c) is not in dispute, other than this particular issue.

Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or her delegate is required to determine as a matter of discretion whether an alien merits the relief sought, and the alien bears the burden of demonstrating that his application

warrants favorable consideration. See Matter of Marin, 69 I&N Dec. 581 (BIA 1978). The exercise of discretion requires a consideration of all the facts and circumstances involved. There must be a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as a permanent resident.

As the negative factors grow more serious, it is incumbent upon the alien to introduce additional offsetting, favorable evidence that may require a showing of unusual or outstanding equities. Such heightened showing is required when an alien has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs.

The necessity of demonstrating unusual or outstanding equities is not exclusively triggered by serious crimes involving controlled substances. Rather, one must examine the gravity of the offense per se . Matter of Besceme, 19 I&N Dec. 628 (BIA 1988). A showing of unusual or outstanding equities may be required because of a single serious crime or because of a succession of criminal acts, which together establish a pattern of serious criminal conduct. An alien who demonstrates unusual or outstanding equities does not compel a favorable exercise of discretion. Rather, absent such equities, relief will not be granted in the exercise of discretion. The court is not going to find that there are unusual and

outstanding equities which would have been necessary in this case. However, the respondent must demonstrate that he warrants a favorable exercise of discretion with respect to his application.

In balancing the favorable and unfavorable factors, favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country, particularly when began at a young age, evidence of hardship to the respondent and family if deportation occurs, service in the U.S. military, a history of employment, the existence of property of business ties, evidence of value and service to the community, proof of genuine rehabilitation, and if a criminal record exists, other evidence attesting to a respondent's good character.

Among the factors deemed adverse to an alien are the nature and underlying circumstances of a ground of removability at issue, the presence of additional significant violations of the country's immigration laws, the existence of a criminal record and if so, it's nature, recency and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident in this country.

LEGAL ANALYSIS AND CONCLUSIONS

The court concludes that even if the respondent had a comparable ground of excludability that would not have been a problem in the 212(c) application, the court would have denied the respondent's application for a 212(c) waiver as a matter of discretion.

That is not to say that the respondent does not have equities favorable to him. The court would look at the respondent's long duration in the United States. He was admitted in January 1978 as a immigrant. And so, he has very long duration in the United States as a lawful permanent resident, and the court considers that to be a strong equity in his favor. The court would note that the respondent was in his mid –twenties when he arrived in the United States. So, this is not a case where the respondent came to the United States at a young age.

The respondent also has strong equities in his family in the United States. It is clear that he has a close and loving relationship with his wife and children. The court did note that the wife and children were present to testify in this case, and the court is convinced that they do have a close and familial relationship. So that is not an issue. In addition., the court would note that the respondent's wife in this case does have a disability of her leg, and she also has had back injuries; and, the court did consider the hardship to the respondent's wife in this particular case because of those disabilities. The respondent and

his wife claim that she cannot work as a result of those injuries. However the court did not receive any medical documentation to show that these injuries are so significant that she could not work. However, the court does recognize that her disabilities do exist; and the court did give that consideration in balancing the positive and negative factors in this case.

However, the court also was concerned with respect to the seriousness o the crime in this case. The court notes that the respondent pled down from more serious charges in this case and was convicted of attempted manslaughter with a firearm in violation of Florida statutes. The court was extremely troubled, however, by the utter disregard of the safety of his family during this incident in 1994. The court would note also that the respondent, the wife and daughter, all attempted to minimalize the incident. The wife, the daughter, and the rest of the children are taking a position that they have forgiven the respondent for this, and they do not believe that he would have intended to harm them. However, the court viewed the respondent's testimony somewhat denying responsibility for the incident. He initially testified that he did not shoot at his wife, but rather shot at the floor, and that the bullet ricocheted and grazed his daughter's ear. Basically, the daughter when she testified, testified as to only one shot being fired. But in looking at the police report here with respect to this incident, which the respondent ultimately did concede was an accurate depiction

of what transpired on that date, the court would note that this description included the fact that two shots were fired, that one was shot through the bathroom door, that there were specific threats by the respondent to kill his wife in this case on two different occasions, in two different incidents; and the weapon was pointed at the respondent's wife when it the bullet went off. The respondent acknowledges that he had been drinking at that time and does not exactly remember everything that happened. However it appears to the Court that the respondent's family was very, very lucky, in that they did not sustain serious injuries. Also, the court cannot understand the utter disregard for the safety of the respondent's family members and did consider this to be a very serious incident. The seriousness of that incident was also aggravated by the respondent's subsequent attempt to obtain a weapon in 1998. The court cannot understand why the respondent would have proceeded to attempt to get another weapon when he had had this tragic incident that had previously occurred in his family. The fact that he lied about his prior felony conviction in an attempt to obtain the weapon again makes the situation much more serious and also recency to the respondent's criminal misconduct. There was some testimony of the respondent with respect to yet another incident, when the respondent first came to the United States. However, we did not get a good factual scenario, and the court received no copies of that arrest record or anything else. The respondent initially testified that he had not been arrested

since 1994. The court would certainly have expected the respondent would have admitted to the conviction in 2000 initially rather than down play it as more of a tag violation or a technical violation.

The respondent and his family testified that he has been complying with all of the terms of his probation. The court does understand that the probation was extended as a result of the new charge. But altogether, it appears that the respondent's probation has been extended to a period of ten years, and the court received no documentation from the probation officer indicating that all requirements had been met or that the respondent was completing his probation satisfactorily. The court is assuming that there has been no serious problems, because the court was not provided with any probation violations or anything of that nature. However, it would have been very helpful for the court to have a progress report from the probation officer to understand the respondent's status. He did indicate that he went to some classes for some alcohol treatment. However, the court received no certificates of completion of any anger management or any drug and alcohol abuse assistance. Further the court is not convinced that the consumption of alcohol beverages has ceased. There as inconsistent testimony as to the respondent's alcohol abuse since that incident. The respondent's wife and daughter indicated that he had had no alcohol since the incident in 1994. However, that's contradicted

by the respondent's testimony, who indicated that he has very seldom had drinks and has not had a drink in the last year. But the inconsistencies here is troubling to the court.

The respondent provided no information with respect to any community contributions, other than those directed by the judge in his case. There was no volunteer work, nothing of community volunteer work or no contributions to the community. There was no showing of any military service for the respondent.

The court was seriously concerned about the respondent's income tax filing. It's clear to the court that there has been significant under reporting of the respondent's income for the many years that he has been self-employed in the United States. The respondent testified that he earned two hundred to two hundred and fifty dollars per day from his sale of hot dogs and other food items from the cart that he has. He indicated that he was making a hundred eighty dollars per day profit, that he worked seven days a week, that he was profiting in the amount of about a two thousand dollars a week as a result of that business. The court realized that there are expenses with respect to his business, but the amounts reported on the income taxes were seriously under what the respondent testified that he was making as a result of that business. It appears that there were periods of non- reporting, and the respondent was basically reporting four to five thousand dollars of income

per year. In the year 2000 he reported eight thousand dollars in the year 2001. He only reported one thousand eighty-two dollars. This would be very inconsistent with the respondent's testimony with respect to what his monthly subsistence expenses. His monthly expenses greatly exceed the amount reported in his income tax., because even his gross sales appear to have been grossly under reported. The respondent did testify that he was providing financial assistance to his children. And again, that would not have been possible based upon the reported income of the respondent. The court believes that the under reporting of income shows that the respondent in this case lacks good moral character and has certainly not been paying his share of taxes nor making the contributions to this country and the government that one would expect from a person deriving income and livelihood of the amounts which appear to have been earned,. It is not appear that the respondent has medical hospitalization for himself or coverage for his wife other than the amounts that she's receiving as a result of insurance settlements. She's receiving treatment for her back apparently as a result of insurance claims.

The court also noted inconsistencies from the respondent relative to his work experience. Prior to coming to the United States, the respondent indicated he only worked slightly with his father before coming to the United States. But his wife testified that he had worked in the

military, had worked as a police officer, had managed land, and had done significantly more than the respondent indicated he had done while working in Portugal. The court would note that although the standard of living in Portugal might not be as high or as grand as that in the United States , the Court does not believe that Portugal is a third world country by any stretch of the imagination, and the court could not understand why the respondent could not find employment of equal or similar nature if he were returned to Portugal. It does not appear that there was genuine efforts on the respondent's part to explore that as an option. There were inconsistencies with respect to the family remaining in Portugal. The respondent testified that his wife has no family in Portugal; and yet, the wife testified that she has two brothers, although they are ill, but they are family in Portugal. So, the court is not exactly sure as to whether it received correct and accurate information with the family support system that will be available to the respondent in Portugal. The court would note the close relationship with the respondent to his children and his grandchildren, and that they do live in the United States, although the court would again note that all of these children are emancipated, married, and living with families of their own. So in view of all of these factors, the court would have denied the respondent's application for a waiver under Section 212(c) of the Act.

In light of the foregoing and after considering all the testimony and documentary

evidence of record, the following order will be issued:

ORDER

WHEREFORE IT IS ORDERED that the respondent's application for a 212(c) waiver be denied.

WEHREFORE IT IS ORDERED that the respondent shall be removed and deported to Portugal based upon the charges set forth in the Notice to Appear.

S/S

MAHLON HANSON
Immigration Judge